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No. 85-960

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JAMES R. COLSON
Petitioner

v.

STATE OF MAINE
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Given the United States Supreme Court's decisions in Gagnon v. Scarpelli and Morrissey v. Brewer that there is no automatic right to counsel in post-conviction hearings, did the Maine Supreme Judicial Court correctly conclude that the Petitioner did not have a right to counsel at a post-conviction hearing in which the only issue was whether he had willfully refused to pay a criminal fine?

STATEMENT OF THE CASE

Respondent does not accept the "STATEMENT OF THE CASE" in the petition for writ of certiorari at 6-11. Respondent accepts the Maine Supreme Judicial Court's statement of fact contained in Colson v.

State, 498 A.2d 585, 586 (Me. 1985); App. A-2 to A-6.

REASONS WHY THE WRIT SHOULD BE DENIED

Mr. Colson's petition for writ of certiorari should be denied because this Court in previous cases has already rejected Petitioner's basic claim that there is an automatic right to counsel in a post-conviction hearing. The Maine Supreme Judicial Court followed this precedent and correctly concluded that Petitioner's post-conviction hearing was not so complex or adversarial as to require assistance of counsel. Moreover, Petitioner has waived any specific claims that he was treated unfairly at his post-conviction hearing, and there is nothing of record that suggests that he was actually denied due process.

I. PURSUANT TO GAGNON V. SCARPELLI AND MORRISSEY V. BREWER, THE MAINE SUPREME JUDICIAL COURT CORRECTLY CONCLUDED THAT THERE WAS NO RIGHT TO COUNSEL AT PETITIONER'S POST-CONVICTION HEARING.

Pursuant to 17-A Maine Revised Statutes Annotated (M.R.S.A.) § 1304, the Maine District Court on its own motion brought Petitioner Colson before it for a post-conviction hearing. The purpose of this hearing was to determine whether Colson had willfully failed to pay a criminal fine. Petitioner claims he had an automatic right to assistance of counsel at this § 1304 post-conviction hearing. This Court has already decided this issue against the Petitioner.

In Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972), this Court rejected claims of automatic right to counsel in post-conviction hearings. In those cases this Court held that while a convicted person facing a post-conviction hearing is entitled under the Fourteenth Amendment to due process, there is no automatic right to assistance of counsel. Rather, this right to counsel must be determined on a case by case basis and depends on the complexity of the hearing in question. Gagnon, 411 U.S. at 788-89.

The Maine Court accepted this precedent of Morrissey and Gagnon and found that while Mr. Colson was guaranteed due process at his § 1304 post-conviction hearing,

there was no automatic right to assistance of counsel. The Maine Court's conclusion was based on its finding that Petitioner Colson was a convicted criminal and, therefore, under Morrissey, had only a "conditional liberty dependent upon payment of the fine." Colson, 498 A.2d at 588; App. A-12 (citing Morrissey, 408 U.S. at 480).

Turning to the case-by-case analysis prescribed by Gagnon, the Maine Court concluded that Mr. Colson's case did not justify assigning him counsel. Colson, 498 A.2d at 589; App at A-16.

This conclusion is correct. As the Maine Court noticed (Colson, 498 A.2d at 588-89), the § 1304 hearing is not adversarial -- i.e., the State is not

necessarily represented and the hearing is really a colloquy between the Court and convicted person. Moreover, the only issue is whether the failure to pay a criminal fine is excusable. This question can be answered by a defendant from personal knowledge of his finances, without any need for assistance of counsel. That is, Mr. Colson simply had to explain to the Judge what circumstances lead to his failure to pay the fine. As the Maine Court stated in its decision:

> Given the straightforward nature of the section 1304 hearing, the court should not ordinarily encounter substantial complexities. Serious departures from substantial justice may be appropriately handled on post-conviction review.

Colson, 498 A.2d at 588; A-16.

Given the relatively simple and non-adversarial nature of the Petitioner's post-conviction hearing, the Maine Court's judgment that there was no right to counsel was correct and should not be reviewed by this Court.

II. THE PETITIONER HAS WAIVED ANY SPECIFIC CLAIMS THAT HE WAS TREATED UNFAIRLY AT HIS POST-CONVICTION "SHOW CAUSE" HEARING, AND THERE IS NOTHING OF RECORD BEFORE THIS COURT THAT SUGGESTS THAT HE WAS ACTUALLY DENIED DUE PROCESS.

The facts of Mr. Colson's post-conviction hearing do not suggest in any way that he was harmed by the lack of an attorney's assistance. The Maine

Supreme Judicial Court stated that "the only stage in a section 1304 hearing at which an attorney could offer assistance would be a determination under subsection 1304(1) whether the petitioner's failure to pay was excusable." Colson, 498 A.2d at 588. Indeed, the only issue at a § 1304 "show cause" hearing is whether the failure to pay a criminal fine is excusable. Petitioner, however, has expressly waived this issue. Petitioner has also expressly waived any claim that he was unable to pay his criminal fine when originally imprisoned. Colson, 498 A.2d at 586. Petitioner therefore cannot demonstrate, nor does the record suggest, any fundamental unfairness to him from the lack of an attorney's assistance at his

post-conviction hearing. The Petitioner was correctly and fairly imprisoned for failure to pay his criminal fine. Bearden v. Georgia, 461 U.S. 660 (1983).

III. THERE IS NO CONFLICT BETWEEN THE MAINE SUPREME JUDICIAL COURT'S DECISION AND THE CASES CITED BY THE PETITIONER.

The Petitioner claims that decisions from other state and federal jurisdictions are in conflict with the Maine Court's decision. These other decisions, however, deal with civil cases involving such issues as the right to an attorney for a father who faces possible incarceration for failure to pay child support. Such civil cases are substantively different from Mr. Colson's § 1304 hearing. They do not

involve a convicted criminal who has only "conditional" freedom. They do not involve a post-conviction proceeding where the State has an important interest in enforcing its criminal penalties. See Morrissey, 408 U.S. at 480. Therefore, the civil cases cited by the Petitioner are distinguishable from and not in conflict with the Maine Court's decision. These civil cases do not offer grounds for review under Sup. Ct. Rule 19(1)(b) they do not offer grounds for review.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: January 21, 1986

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wayne S. Moss, Assistant Attorney General, a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3, I have caused three (3) copies of the foregoing "Brief In Opposition" to be served on the only other party to this proceeding by depositing said copies in the United states mail, on January 22, 1986, postage prepaid, addressed to the Petitioner's Counsel of Record, Stanley F. Greenberg, Esquire, as follows:

Stanley F. Greenberg, Esquire
443 Congress Street
Portland, Maine 04101

Dated at Augusta, Maine this 21st day of January, 1986.

Wayne S. Moss

WAYNE S. MOSS
Assistant Attorney General